Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area	)	WC Docket No. 05-281

MOTION TO VACATE

Covad Communications Group, Inc. ("Covad"), NuVox Communications, ("NuVox") and XO Communications, LLC ("XO"), collectively the "Movants," by their attorneys and pursuant to Section 1.41 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. 1.41, hereby move the Commission to vacate the Memorandum Opinion and Order granting the Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area.[1] For the reasons discussed herein, vacature of the *Anchorage Order* is warranted because no case or controversy continues to exist, rendering the *Order* meaningless and unnecessary. Further, allowing the *Anchorage Order* to remain in the public domain to be referred to and relied upon by other entities in future forbearance proceedings would contravene the public interest. If the Commission's statements regarding the limited scope of the *Order* are accepted, the fact-specific focus of the Commission's analysis, combined with the fact that the only entities found to be impacted by the *Order* (*i.e.*, ACS and GCI) have voluntarily resolved their differences outside of the framework

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[1] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Order*" or "*Order*").

of the *Order*, has resulted in an *Order* that has no "real world" applicability or impact and thus should be removed from the public domain.

I. BACKGROUND

The *Anchorage Order* was issued in response to a petition by ACS of Anchorage, Inc. ("ACS") for forbearance from its statutory obligations related to unbundling and pricing of unbundled network elements ("UNEs") in the Anchorage, Alaska local exchange carrier study area.[2] In the alternative, ACS sought forbearance from these obligations with respect to its dealings with General Communication, Inc. ("GCI"), its chief competitor and the only other facilities-based provider in Anchorage.[3] In the *Anchorage Order*, the Commission granted, in part, ACS's request for forbearance.[4] More specifically, the Commission granted ACS relief from Section 251(c)(3) unbundling obligations and Section 251(d)(1) pricing obligations in 5 of the 11 wire centers in the Anchorage study area, where it found that "the level of facilities-based competition by the local cable operator, General Communication Inc. (GCI) ensures that market forces will protect the interests of consumers and that such regulation, therefore, is unnecessary."[5] The Commission emphasized the extremely limited nature of its decision, explicitly stating that it was "adopt[ing] . . . no rules of general applicability."[6]

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2 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, at 1 (filed Sept. 30, 2005) ("*ACS Petition*").

3 *ACS Petition,* at 2-4.

4 *See, e.g., Anchorage Order*, ¶ 2.

5 *Id.*

6 *Id.*, ¶ 1.

ACS and GCI each sought judicial review of the *Anchorage Order*,[7] but later sought and obtained voluntary dismissal of their respective petitions after resolving the issues addressed in the *Order*.[8] The Movants, and various other interested parties, also sought judicial review of the *Anchorage Order,* before the United States Court of Appeals for the Ninth Circuit,[9] but their consolidated appeals were dismissed, at the Commission's request, on the grounds that the petitioning parties lacked standing.[10] The Commission argued that because the petitioners are "strangers to the Anchorage, Alaska local exchange marketplace, they can establish no concrete injury in fact that is traceable to the *Order* on review" that is the minimum of Article III standing.[11] The Ninth Circuit agreed, finding that the "Petitioners have not demonstrated an 'injury in fact' that is 'fairly traceable' to respondent's action."[12]

II. THE *ANCHORAGE ORDER* HAS NO "REAL WORLD" APPLICABILITY OR IMPACT AND THEREFORE SHOULD BE VACATED

As noted above, the Commission has consistently maintained that the *Anchorage Order* is limited in scope and effect to the unique circumstances found to exist in the Anchorage, Alaska study area and, consequently, that the only entities impacted to any degree by the *Order*

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7 *General Communication, Inc. v. FCC*, No. 07-70526, Petition for Review (9th Cir. filed Feb. 12, 2007); *ACS of Anchorage Inc. v. FCC et al.*, No. 07-1037, Petition for Review (D.C. Cir. filed Feb. 9, 2007).

8 *See ACS of Anchorage Inc. v. FCC et al.*, No. 07-1037, Petitioners' Motion for Voluntary Dismissal, (D.C. Cir. filed Mar. 21, 2007); *General Communication, Inc. v. FCC*, No. 07-70526, Motion for Voluntary Dismissal of General Communication, Inc. (9th Cir. filed Mar. 21, 2007).

9 *See Covad Communications Group, Inc. et al. v. FCC*, No. 07-70898, Petition for Review (9th Cir. filed Mar. 6, 2007); *McLeodUSA Telecommunications Services, Inc., v. FCC,* No. 07-71076 (9th Cir.); *Integra Telecom, Inc., et al., v. FCC,* No. 07-71222 (9th Cir.).

10 *Covad Communications Group, Inc. et al. v. FCC*, Case No. 07-70898, Order (9th Cir. Jun. 14, 2007) ("*9th Cir. Dismissal Order*").

11 *Covad Communications Group, Inc. et al. v. FCC*, Case No. 07-70898, Motion to Dismiss (9th Cir. filed Apr. 19, 2007) ("*FCC Motion to Dismiss*"), at 6.

12 *9th Cir. Dismissal Order*, at 2.

are those entities participating in the Anchorage market.[13] The Commission successfully challenged the Movants' standing to obtain judicial review of the *Anchorage Order* on the ground that their non-participation in the Anchorage market resulted in the absence of any injury traceable to the *Order*, which is a necessary predicate for standing.[14] The Commission identified ACS and GCI as "the two parties that compete in the Anchorage area and have a direct interest in the Commission's decision,"[15] and, thus, as the only carriers affected by the *Order*.[16] The Ninth Circuit endorsed the Commission's characterization of the *Anchorage Order* and its effect on and applicability to carriers not participating in the Anchorage market, thus foreclosing any judicial review of the *Anchorage Order*.[17]

In light of the conclusion that the *Anchorage Order* has no applicability to any carrier other than ACS and GCI and the fact that ACS and GCI have voluntarily entered into an agreement addressing their respective network access rights and obligations, the *Anchorage Order* is no longer required to govern their conduct. The *Order* therefore is both unnecessary and irrelevant. Accepting the Commission's premises regarding the scope of the *Anchorage Order*, its *raison d'etre* is to ensure that ACS's dealings in Anchorage with the competitive carrier customers with whom it has not otherwise been able to reach mutually acceptable

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13 *See, e.g., FCC Motion to Dismiss*, at 4 ("[T]he Commission carefully cabined the relief it granted to limited portions of Anchorage – stressing that 'we adopt herein no rules of general applicability,' . . . and cautioning that because 'this proceeding considers factors unique to' the Anchorage area, the Commission 'may reach different conclusions in other markets.'").

14 *See, e.g., FCC Motion to Dismiss*, at 6 ("[A]s strangers to the Anchorage, Alaska local exchange marketplace, [the petitioners] can establish no concrete injury in fact that is traceable to the *Order* on review.").

15 *Id.*, at 5.

16 *Id.*, at 7 ("Now that ACS and GCI have dismissed their petitions for review, not one of the remaining judicial challenges . . . involves a petitioner that serves the Anchorage market. The remaining petitioners are, thus, unaffected by the *Order*.").

17 *See 9th Cir. Dismissal Order*, at 2.

arrangements meet the requirements of the Act, specifically including ACS's Section 251(c)(3) unbundling obligation. Here, since GCI has been found to be the only carrier customer of ACS with any Section 251(c)(3) requirements, and since GCI and ACS have voluntarily entered into an arrangement to govern those requirements, the predicate for the *Order* no longer exists.

To permit the *Anchorage Order* to remain "on the books" where it can be cited to and relied upon by parties in other forbearance proceedings (despite the Commission's clear indications that they should not do so) would disserve the public interest. Notwithstanding the Commission's representations that the *Anchorage Order* has no applicability outside of Anchorage, Alaska, petitioning parties have begun to cite the *Order* as precedent in other forbearance dockets. For example, in the Verizon Telephone Companies' ("Verizon") 6-MSA forbearance docket,[18] Verizon attempts to dispose of the argument that Section 251(c)(3) forbearance would lead to a duopoly by citing the *Anchorage Order*, stating that the Commission has already rejected such claims.[19] It is particularly unfair and inappropriate to fail to vacate the *Anchorage Order* (notwithstanding its irrelevance to the carriers participating in the Anchorage market) since it was not subject to judicial review.

Commission precedent supports vacatur of the *Anchorage Order* on the ground that the parties (*i.e.*, ASC and GCI) have settled their dispute. In *Cavalier Telephone v. Virginia*

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18 *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area* (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area* (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area* (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area* (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area* (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area* (filed Sept. 6, 2006), WC Docket No. 06-172 (consolidated).

19 *Reply Comments of Verizon*, WC Docket No. 06-172, at n.31 (filed Apr. 18, 2007).

Electric and Power Company,[20] the Commission granted a joint motion by Cavalier and VEPCO to vacate a Cable Services Bureau order in connection with their settlement of a multi-forum dispute.[21] In doing so, the Commission acknowledged its previous action vacating orders in connection with settlements[22] and stated that while it will not routinely vacate orders, it will do so "where 'the parties make a showing of some special circumstances beyond the mere fact that the case has been settled.'"[23] The Commission stated further that "[i]n making this determination, [it] considers the public interest in maintaining any precedential effect of the order in question"[24] and avoids vacatur where it is simply a means for "a party with deep pockets to eliminate a precedent it dislikes."[25]

Here, there is no public interest in preserving the *Anchorage Order* as precedent because, as the Commission has repeated numerous times, the *Order* has no precedential effect. Indeed, the public interest favors vacatur of the *Order* to preclude parties from ignoring the Commission's statements and continuing to rely on the *Order* in their advocacy in current and future Section 251(c)(3) forbearance proceedings. Indeed, failure to vacate the *Order* would implicitly condone future reliance on it despite the Commission's explicit assertions that the *Order* did not adopt any rules of general applicability.

Moreover, vacatur of the *Anchorage Order* is warranted in light of the fact that the *Order* was insulated from judicial review. The Movants maintain that this fact alone

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20 *Cavalier Telephone, LLC v. Virginia Electric and Power Company d/b/a Virginia Power*, Order, 17 FCC Rcd 24414 (2002) ("*Cavalier v. VEPCO*").

21 *Id.*, ¶ 15.

22 *Id.*, ¶ 16.

23 *Id.*, citing *Applications of Crystal Communications, et al.*, Order, 12 FCC Rcd 2149, 2151 (1997).

24 *Id.* (footnote omitted).

25 *Id.*, ¶ 4.

constitutes sufficient "special circumstances" to justify use by the Commission of its authority to vacate the *Order*. The fact that GCI and ACS withdrew their petitions for review after reaching a presumably mutually beneficial settlement does not negate the merits underlying their initial requests for judicial review. Similarly, the Court's dismissal of the Movants' petition based on lack of standing does not reflect the strength of the arguments the Movants had intended to make. The fact that eight carriers filed five separate petitions for review of the *Anchorage Order* is a clear indicator that there may have been deficiencies in the Commission's decision that warranted remand or reversal. In light of the uncertainly surrounding whether the *Order* would have withstood judicial review, and because the only parties affected by the *Order* have resolved their dispute, thereby negating any ongoing need for the *Order*, it is in the public interest for the Commission to grant the instant Motion and vacate the *Order*.

III. CONCLUSION

For the foregoing reasons, the Movants' Motion to Vacate should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patricia A. Bell, do hereby certify that a true and correct copy of the foregoing "Motion To Vacate" were served this 5th day of July 2007, via first class mail, postage prepaid, upon the following:

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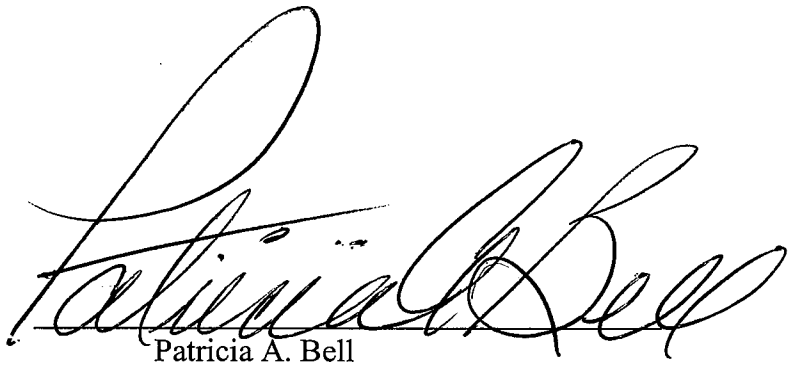

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